Issues in Cross-Border Insolvency: 
-Case Studies from Europe, USA, UK

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UNCITRAL Model Law on Cross-Border Insolvency (1997)

- **Date of adoption:** 30 May 1997
- **Purpose:** The Model Law is designed to assist States to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency.
- It focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws.
- “A cross-border insolvency is one where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place”

Issues in Cross-Border Insolvency
Key provisions

(a) Access:
- representatives of foreign insolvency proceedings and creditors a right of access to the courts to seek assistance
- authorize representatives of local proceedings to seek assistance elsewhere.

(b) Recognition
- simplified procedures for recognition of qualifying foreign proceedings and appointing the foreign representative.
  - a qualifying foreign proceeding is either a main proceeding, taking place where the debtor had its centre of main interests- COMI
  - a non-main proceeding, taking place where the debtor has an establishment.
- effects - the relief accorded to assist the foreign proceeding.

(c) Relief
- interim relief at the discretion of the court
- an automatic stay upon recognition of main proceedings

(d) Cooperation and coordination
- cooperation among the courts of States where the debtor's assets are located and coordination of concurrent proceedings concerning that debtor.
EU Case Study: Eurofood IFSC Ltd 2006 ECJ (C-341/04)

- Regulation (EC) No 1346/2000- Judicial cooperation in civil matters
- Decision to open the Insolvency proceedings
- Centre of the debtor’s main interests (COMI)
- On February 20, 2004, the Parma court at Italy opened a main insolvency proceeding for Eurofood.
- It found that Eurofood's center of main interests ‘COMI’ was located in Italy, because its management and center of control came from its Parmalat parent that was located there.
- The Irish liquidator appealed, but the Italian appellate court affirmed.
- On March 23, 2004, the Dublin High Court found that Eurofood's COMI was located in Ireland, because its registered office was located there and it ‘appeared to the third party creditors’ that its COMI was located in Ireland.
- The court further held that an Irish main proceeding had opened on 27 January 2004, when it had appointed the temporary liquidator.
- The Italian administrator appealed this decision to the Irish Supreme Court, which referred the matter to the ECJ.
Centre of Main Interests (COMI): Place of Registered Office

- Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect.

- That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated.
‘Main insolvency proceedings’: The rule of priority

- The main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.

- The rule of priority provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings.
The Irish Supreme Court referred questions on the interpretation of the Regulation to the ECJ:

What constituted the opening of insolvency proceedings within the meaning of the Regulation and which national court had jurisdiction to open main insolvency proceedings?

What are the governing factors for determining centre of main interests when the registered office of a parent company and its subsidiary are located in different member states?

Whether a member state had to give recognition to a decision of another member state purporting to open insolvency proceedings in respect of a debtor, when that debtor had not been given the right to fair procedures and a fair hearing.
Facts and Analysis

- The European Court of Justice (ECJ) gave opinion on referral by Supreme Court of Ireland of 5 questions of EU Insolvency Regulation.
- Whether to open a main insolvency proceeding for Eurofood IFSC Ltd in competition with a parallel main insolvency case for the same entity in Parma, Italy.
- In re Eurofood IFSC Ltd., [2004] IESC 45 (Ir.).
- The two parallel main proceedings arose because each court decided that Eurofood's center of main interests (CoMI) was located in its own country Case 341/04, Eurofood IFSC Ltd, 2006 E.C.R.__. (Eurofood-ECJ).
- According to the language used in the English version of the EU Regulation, a "proceeding" corresponds to a "case" under U.S. bankruptcy law. See, e.g., 11 U.S.C. §§ 301-03 (providing for the filing of a "case" under the bankruptcy statute).
2 sets of factors necessary to determine the proper location of the CoMI of a subsidiary

The first set of factors is the location where a debtor regularly administered its own interests, as ascertainable by third parties, and the country in which it is incorporated.

The second set of factors arises from the location of the parent company which, by virtue of its ownership and power to appoint directors, is able to control the policy decisions of the subsidiary.

Where (as in the Eurofood proceedings), these factors point to different countries for the location of the CoMI, the court must determine the relative weight to give to each factor.

The criteria is required to be both objective and ascertainable by third parties, typically the debtor's major creditors.

As in the Eurofood proceeding, third parties may have undertaken considerable effort in exercising due diligence to assure themselves as to the location of the debtor's CoMI.
Presumption that CoMI is Located in Country of Registered Office

- **Rebuttal of Presumption**
- Under U.S. law, there are a variety of ways of treating a presumption and its possible rebuttal
- **ECJ Decision on Rebuttal Requirements**
- "letter-box" company that is not carrying on any business in the country where its registered office is located.
- The presumption that Eurofood's CoMI was located in Ireland, because its registered office was located there, was supported by the evidence of the expectations of its major creditors.
- Given this evidence, the location of its parent corporation Parmalat SpA in Italy was insufficient to rebut the presumption.
USA Chapter 15 Bankruptcy Code

- Determination of a foreign debtor’s “center of main interests” (“COMI”).
- Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.), No. 11-4376, 2013 BL 102426 (2d Cir. Apr. 16, 2013)
- U.S. Court of Appeals for the Second Circuit ruled that COMI must be determined on the basis of the debtor’s “activities at or around the time the Chapter 15 petition is filed,” rather than on the commencement date of the foreign proceeding.
- Court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith.”
- Factors that may be considered in determining COMI, may include the debtor’s liquidation activities.
“COMI” under US Bankruptcy Code

- Section 1517(b) of the Bankruptcy Code provides that:
  - a “foreign proceeding shall be recognized . . . as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests.”
- The Bankruptcy Code does not define “COMI.”
- Section 1516(c) provides that, “[in] the absence of evidence to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be” the debtor’s COMI.
- According to the statute’s legislative history, this presumption was included “for speed and convenience of proof where there is no serious controversy.”
- An “establishment” is defined in section 1502(2) as “any place of operations where the debtor carries out a non-transitory economic activity.”
Mr Kemsley was an English businessman to whom Barclays made an unsecured loan for £5 million.

In June 2009, he and his family moved to the US.

A bankruptcy petition was issued against him by HMRC in the UK in November 2011. He then issued a debtor's petition for his own bankruptcy in January 2012. He claimed he was in the UK on the date the petition was presented, was domiciled in the UK and had a place of residence in the UK within the previous 3 years, as required by s265 Insolvency Act 1986.

On 1 March 2012, Barclays issued proceedings in New York

Kemsley was made bankrupt in the UK on 26 March 2012 on his own petition.

Bankruptcy Trustees were appointed in UK, applied for recognition of the UK bankruptcy in US u/ Chapter 15 (in August 2012).
The US bankruptcy court ruled that Kemsley's COMI was in the US as of such date because "the Debtor's close relationship with his children serves as a useful proxy for the Debtor's subjective intent regarding his habitual place of residence."

At the time of the filing of the UK proceeding, he was living in the US with his family, therefore his COMI was then in the US.
INDIA
Recommendations by the Justice Eradi Committee and N.L. Mitra Advisory Group on Bankruptcy Laws.

- The Eradi Committee Report:
  - Recommended that the Model Law be implemented in India; Amendment of Part VII of Companies Act, 1956
  - in-bound and our-bound requests for recognition of foreign proceedings,
  - co-ordination of proceedings in two or more States and
  - participation of foreign creditors in insolvency proceedings

- The N. L. Mitra Committee:
  - Indian laws on cross border insolvency are outdated and are not comparable to international legal standards
  - in the event of an international insolvency proceeding involving an Indian company, Indian courts are unlikely to provide any aid or assistance to a foreign liquidator
  - Proposed a Comprehensive Bankruptcy Code
Winding up proceedings under the Companies Act, 1956:-

companies registered in India under the Companies Act, 1956
- Indian courts have jurisdiction to hear and adjudicate upon proceedings irrespective of the fact that the main business of the company may be carried out elsewhere.
- In such proceedings, Indian as well as foreign creditors can prove their debts.

companies that are not registered in India
- winding up proceedings may be initiated u/s 584 of the Companies Act, 1956, if it had a place of business in India and in the following circumstances:
  - if the company is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs
  - if the company is unable to pay its debts
  - if the court is of the opinion that it is just and equitable that the company should be wound up

Ss 13 and 44A of the CPC provide for the treatment of foreign judgments in reciprocating countries as conclusive, barring certain exceptions, such as fraud, judgment not based on merits, not competent jurisdiction, etc.
Foreign creditors of a company which is incorporated in England and carried on business in India can prove their claims in the winding up proceedings of the company as an unregistered company in India.

The Courts of a country dealing with the winding up of a company can ordinarily deal with the assets within their jurisdiction and not with the assets of the company outside their jurisdiction.

S. 271(3) says that the company incorporated outside India may be wound up as an un-registered company when it ceases to carry on business in India.
Cross-Border Insolvency in India
- The way ahead....

- IBC 2016
  - Agreements with foreign countries (Section 234)
  - Letter of request to a country outside India in certain cases. (Section 235)

- UNCITRAL Model Law on Cross-Border Insolvency ??
Agreements with foreign countries.

234.(1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.

(2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.
Letter of request to a country outside India in certain cases.

235. (1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.

(2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request.